PETITION FOR WRIT OF CERTIORARI

93-593

Supreme Court, U.S.
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Case No.

IN THE SUPREME COURT

FOR THE UNITED STATES

1993-94 TERM

ROBERT DAVIS, et al.,

Plaintiffs/Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants/Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a temporary or substitute teacher denied permanent employment has standing to sue for damages and injunctive relief against an affirmative action plan which seeks to match the percentage of minorities employed by the district to the percentage of minority students where the school district has advanced non-discriminatory reasons for denial of permanent employment.

2. Whether summary judgment should have been entered enjoining an affirmative action plan which seeks to match the percentage of minorities employed by the district to the percentage of minority students.

3. Whether a temporary or substitute teacher denied permanent employment under an affirmative action plan which seeks to match the percentage of minorities employed by the district to the percentage of minority students has established a prima facie case of discrimination under Title VII.

LIST OF PARTIES

Plaintiffs/Appellants/Petitioners
Robert Davis
Jane Kennedy
Angela Wingate
Jan Sutter
Susan Tibbon
Anna Marie Karsant

Defendants/Appellees/Respondents
The City and County of San Francisco, a municipality
The San Francisco Unified School District, a municipal agency
The San Francisco Board of Education, a municipal agency

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JURISDICTION

Petitioners, (plaintiffs below) complained of civil rights violations arising from unlawful employment practices. Jurisdiction of the United States District Court for the Northern District of California concerning their federal question claims was conferred under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Jurisidiction concerning their supplemental state law claims was conferred under 28 U.S.C. § 1367.

Petitioners then appealed this final judgment. Jurisdiction of the United States Court of Appeals for the Ninth Circuit was proper under 28 U.S.C. § 1291. The Ninth Circuit entered judgment affirming the judgment of the District Court on July 15, 1993. Petitioners seek

review of this judgment.

Petitioners hereby petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This Court has jurisdiction to hear the case under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1291

28 U.S.C. § 1254

28 U.S.C. § 1331

28 U.S.C. § 1367

28 U.S.C. § 1983

28 U.S.C. § 2000(e)(5)

F.R.C.P, Rule 54(a)

Supreme Court Rule 10

U.S. Constitution, 14th Amendment

STATEMENT OF THE CASE

Six[1] non-minority temporary and substitute teachers -- Robert Davis, Jane Kennedy, Angela Wingate, Jan Sutter, Mary Ann Wold, Susan Tibbon, and Anna Marie Karsant (the "petitioners") -- brought this suit to challenge the discriminatory employment practices of the San Francisco Unified School District ("SFUSD"). Appendix to Petition for Writ of Certiorari, infra ("Appendix"), 46. In addition to several state law claims, their complaint alleged that the hiring and promotion practices of the San Francisco Unified School District constituted racial discrimination under Title VII (42 U.S.C. § 2000(e)(5)), and

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[1] Mary Ann Wold has elected not to pursue this appeal.

constituted a violation of the First and Fourteenth Amendments to the United States Constitution as violations of the rights to equal protection under the law. Id, at 49. Federal question jurisdiction (and supplemental jurisdiction over the state law claims) was therefore proper in the United States District Court for the Northern District of California. 28 U.S.C. § 1331, 28 U.S.C. § 1983, 28 U.S.C. § 1367.

After some discovery, petitioners moved for summary adjudication of their sixth cause of action (for declaratory relief), of respondent's twenty-fourth affirmative defense (respondent's actions were privileged as being mandated by a valid consent decree), and a determination that petitioners had proved

a prima facie case of discrimination. Appendix, 50.

Respondents then cross-moved for summary judgment, and asserted, among other things, that petitioners lacked standing to maintain these claims. Id., at 52. The District Court determined that petitioners had not been injured, granted the motion of the respondents, and denied the motion of petitioners. Id., at 76. The Court of Appeals for the Ninth Circuit affirmed. Id., at 76. The teachers hereby timely petition for a writ of certiorari.

This case has its roots in an earlier action to desegregate San Francisco's public schools. Id., at 47. After several years of litigation, the District Court, with Judge William Orrick

presiding, approved a consent decree entered into by the National Association for the Advancement of Colored People ("NAACP") and the SFUSD in December of 1982. Id., at 47. In addition to prescribing other remedial measures, the decree required SFUSD to continue to implement the following affirmative action policy:

> The SFUSD shall continue to implement a staffing policy such as that contained in Policy No. 4111.1, the goal of which is "to achieve a staff at each school site and District location that will reflect the student population of the district." Id.

Petitioners were not parties to that litigation, nor were their interests

adequately represented.

Pursuant to the terms of the Consent Decree, SFUSD enacted Policy No. 4111.1, and currently continues to consider this affirmative action plan in all employment decisions. Id., at 47.

The "San Francisco Unified School District Affirmative Action Plan," provided in support of petitioners' motion for summary judgment, notes that approximately 85.2% of its students are minority. See Appendix, infra, at 52. The Plan points out that, nationally, the number of minorities who are teachers (the national labor pool) is approximately 10% minority. Id. The study also shows that the number of minorities currently employed as teachers in San Francisco is 38.5%. Id. Thus,

the percentage of minority teachers employed in San Francisco is almost four times the national average of minority teachers in the national labor pool. The affirmative action plan seeks to increase this percentage to 85%.

In support of their motion for summary judgment, petitioners presented additional unrefuted statistics which established a statistical basis for an inference of discrimination. In California, only 18.45% of the teachers are minority, only half the percentage employed in San Francisco. Id. In the San Francisco Standard Metropolitan Statistical Area (the Bay Area), 20.25% were minority. Id. Within the city limits of San Francisco, 30.39% of the labor pool is minority, but there are

still almost a third more minority teachers hired than are in this limited labor pool. Id.

San Francisco Unified School District hires 38.5% minority teachers in a labor market where only 20.3% are minority. This disparity of over 18% cannot be explained as the result of historical accident. It is the product of eight years of an intentional system of favoring minority applicants over non-minorities.

The judge presiding over petitioners' case was the same judge that entered the consent decree eight years earlier: the Honorable William Orrick. Id., at 96. Perhaps because he wished to avoid invalidating a plan which he himself had approved, he granted summary

judgment in favor of the respondents, holding that petitioners had not established that they had been injured by the system of discrimination in place. Id., at 95. At the same time, he denied petitioners' motion for summary judgment to invalidate the plan and determine that a prima facie case of discrimination under Title VII had been established. Id., at 96. The Ninth Circuit similarly avoided petitioners' claims of discrimination and affirmed the finding that petitioners lacked standing. Id., at 75-76. In doing so, both courts ignored the clear precedents of this Court which establish not only that petitioners have standing to bring this suit, but also that the affirmative action plan is unlawful.

REASONS JUSTIFYING ISSUANCE OF A WRIT OF CERTIORARI

A writ of certiorari should be granted in this case. The United States Court of Appeals for the Ninth Circuit has decided important questions of federal law in a way that conflicts with applicable decisions of this Court. Supreme Court Rule 10.1(c). The Ninth Circuit has ignored the decisions of this Court in order to protect an illegal affirmative action policy. Both the District Court and the Court of Appeals have denied petitioners the relief to which they are entitled on the uncontested facts before the Court. Because the Court of Appeals has decided these important questions in a way that conflicts with the decisions of this

Court, a writ of certiorari is necessary.

I. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED SUMMARY JUDGMENT ON THE ISSUE OF STANDING BECAUSE PETITIONERS ESTABLISHED THAT THEY HAD BEEN INJURED THROUGH THE UNEQUAL TREATMENT OF THE AFFIRMATIVE ACTION PLAN.

The United States District Court avoided reaching the merits of petitioners' claims by granting summary judgment against them on the issue of standing. Appendix, 96. The Court of Appeals for the Ninth Circuit affirmed this finding of no standing, and denied petitioners further relief. Id., at 75-76. These determinations conflict with the decisions of this Court, which have held that plaintiffs in situations similar to that of petitioners' have standing to sue.

Article III of the United States

Constitution limits the jurisdiction of the federal courts to "cases and controversies." Warth v. Seldin, 422 U.S. 490, 498 (1975). No principle is more fundamental to the judiciary's proper role in our system of government that the constitutional limitation of federal-court jurisdiction to actual cases or controversies. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 37 (1976).

It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate the three elements of standing. First, the plaintiff must show "injury in fact," an invasion of a legally protected interest that is (a) concrete and particularized, and (b) not

conjectural or hypothetical. Lujan v. Defenders of Wildlife, 504 U.S. --, --, 112 S.Ct 2130, 2136 (1992). Second, the plaintiff must demonstrate causation: that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court." Simon, 426 U.S. 26, 41-42 (1976). Finally, the plaintiff must show a likelihood that the injury will be redressed by a favorable decision: that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative." Allen v. Wright, 468 U.S. 737, 752 (1984). In this case, petitioners successfully established these elements, and therefore the Ninth

Circuit's determination of this issue against them on the issue of standing was improper.

The finding of the Ninth Circuit that petitioners lacked standing conflicts directly with the decision of this Court in Northeastern Fla. Chapter of the Associated General Contractors v. City of Jacksonville, -- U.S. --, 113 S.Ct. 2297 (1993). In General Contractors, non-minority owned builders challenged a set-aside program which reserved ten percent of city contracts for "minority owned businesses." Gen. Contractors, 113 S.Ct at 2299. The Court of Appeals for the Eleventh Circuit held that the contractors had no standing to sue, because they did not establish that, in the absence of the set-aside program,

any of the plaintiffs would have bid successfully for any of the contracts. Id., at 2300.

This Court reversed, holding that "the 'injury-in-fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Id., at 2303. In such a context, "the 'injury-in-fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." Id. "To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from

doing so on an equal basis." Id. The second and third requirements of standing -- that the defendants' action be the cause of the injury, and that the injury was capable of judicial redress -- follow from this definition of injury in fact, and therefore need not be established separately. Id., at 2303, n.5.

This case involves the question of whether this analysis extends to a temporary or substitute teacher denied permanent employment in a district which considers, as a factor in employment decisions, an affirmative action plan which seeks to match the proportion of minorities employed by the district to the proportion of minority students. Like set-aside programs, affirmative action hiring goals involve facial

discrimination which must be justified by reference to a compelling governmental interest. Wygant v. Jackson, 476 U.S. 267, 274 (1985). The injury in both set-aside and affirmative action cases is the same: the denial of an opportunity to compete equally. In order to show injury, petitioners need not show that they would have obtained the job "but for" the affirmative action goals. See Gen. Contractors, 113 S.Ct, at 2303. Any legitimate, non-discriminatory reasons for denial of permanent employment are therefore irrelevant. All that matters is that "a discriminatory policy" prevented petitioners from competing for permanent positions "on an equal basis." Id.

When the government erects a

> barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury" in fact in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. Id.

Any non-minority teacher seeking permanent employment with the San Francisco Unified School District will be

denied equal treatment. The affirmative action plan, considered as a factor in all employment decisions, would double the percentage of minority teachers while reducing the percentage of non-minorities by 75%. This discrimination causes injury to all non-minorities by making it more difficult to obtain permanent employment. All non-minority teachers seeking permanent employment with the District, then, have standing to challenge these employment practices so long as this policy is in effect.

The Ninth Circuit, analyzing the effect of General Contractors in footnote 4 of their opinion, held that petitioners had not established standing. Appendix, 60, n.4. Since petitioners were not actually "barred from applying for the

jobs they allegedly sought," they did not establish injury-in-fact. Id., at 60, n.4.

The Ninth Circuit, despite their inclusion of footnote 4, contradicts the holdings of General Contractors. Their finding that petitioners did not establish injury is based on an assumption that petitioners are required "to identify a specific job for which [they] applied and that was awarded to a less senior or less qualified minority teacher." Id., at 65. But in General Contractors, "petitioner's complaint did not 'refer to any specific contract or subcontract that would have been awarded to a non-minority bidder but for the set-aside ordinance,'" and yet the Court found standing. Gen. Contractors, 113

S.Ct, at 2300.

The Ninth Circuit relied on Warth v. Seldin, 422 U.S. 490 (1975) in imposing this requirement. Appendix, 60, n.4. But as in General Contractors, Warth is distinguishable: "Warth did not involve an allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit." General Contractors, 113 S.Ct., at 2304. Since in the instant case, as in General Contractors, petitioners seek permanent employment but are being denied the right to compete equally, injury is established without identification of a specific position that would have been theirs absent the affirmative action plan.

The Ninth Circuit further held that

petitioners' difficulties in obtaining employment could not be traced to the affirmative action plan. Appendix, 60, n.4. The Ninth Circuit determined under the second element of the standing analysis that even if injury in fact were established, petitioners had not traced their injuries to the affirmative action plan. Id. Under the Court's reasoning in General Contractors, however, the second and third elements are established whenever unequal treatment is established. See Gen'l Contractors, 113 S.Ct, at 2303, n.5. Since this Court recognizes unequal treatment as sufficient injury to establish standing in this case, there certainly is a causal connection between that injury and the affirmative action plan that mandates the

discrimination. Similarly, whenever discriminatory regulations are enjoined, the injury of unequal treatment is redressed. The second and third elements of standing flow from the first.

The Ninth Circuit also attempted to distinguish between the set-aside program of General Contractors and the affirmative action plan of the instant case by explaining that in the former petitioners were prevented from competing altogether, while in the latter they were not entirely "excluded from consideration." Appendix, 60, n.4. This distinction between a total bar for some posts and a partial barrier to all positions, however, should not be determinative. To distinguish between the two methods of discrimination does

not further the standing analysis. Respondents should not be allowed to defeat the standing analysis by using a different administrative regime, or by "considering" petitioners for employment while subjecting them to a handicap based on their race. The fact that the respondents discriminate, not their method of discrimination, is at issue.

The effect of the affirmative action plan is to deny petitioners an equal opportunity to compete. Having established that they have sought permanent employment, and that the affirmative action plan prevents them from competing on an equal basis, petitioners have established the injury required under Article III.

Both commentators and this Court

have agreed that the law of standing is at times confusing and uncertain. See e.g. Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988), Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency."). It is therefore not entirely surprising that the Court of Appeals and District Court were unable to apply the correct principles of law. This case provides the Court with the opportunity to further clarify the principles underlying the "case or controversy" requirement of Article III of the Constitution. These principles are important not only for

practical determinations of which conflicts are suitable for judicial resolution, but also because they serve as the foundation of the basic structure of separation of powers. Allen v. Wright, 468 U.S., at 750. By resolving the issues in this case, the Court may guide future courts and ensure that the federal judiciary remains within the confines of its constitutional authority.

Because of the extraordinary importance of establishing clear principles in determining standing, and because the District Court and Court of Appeals for the Ninth Circuit erred in failing to find standing, the Court should grant this petition for writ of certiorari.

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II. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED THE DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT ENJOINING THE AFFIRMATIVE ACTION PLAN.

Although petitioners moved for summary judgment to enjoin further operation of the affirmative action plan, the United States District Court denied this relief. Appendix, 96. The Court of Appeals also refused petitioners summary judgment on this issue. Id., at 75-76. The undisputed facts before the Court, however, establish that the affirmative action plan is illegal. Petitioners are therefore entitled to an injunction invalidating the affirmative action plan.

In their motion for summary judgment, petitioners established that the affirmative action plan was in effect, and was considered in making

employment decisions. Id., at 47. The goal of the affirmative action plan, as set out in the consent decree, is to match the percentage of minority teachers to the percentage of minority students. Id. Because this goal is unconstitutional, the policy should have been invalidated by summary judgment.

The SFUSD has already remedied any past discrimination against minority teachers. An affirmative action plan may seek to remedy past discrimination by matching the percentage of minority teachers employed with the percentage of minority teachers in the applicant pool. Wygant v. Jackson Board of Education, 476 U.S. 267, 275 (1986). The Court in Hazelwood School District v. United States, 433 U.S. 299 (1977) held that the

proper comparison for determining the existence of actual discrimination by the school board was "between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." 433 U.S., at 308. Since the percentage of minority teachers employed by SFUSD exceeds the proportion of minorities in the labor pool, any past discrimination has been remedied.

Even though SFUSD has reached the legitimate goal of remedying past discrimination, they continue to illegally favor minorities. This continued discrimination directly contravenes the holdings of this Court. "Hazelwood demonstrates this Court's

focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies." Wygant, 476 U.S., at 275. This Court has found other justifications for affirmative action, such as providing role models for minority students, or dealing with societal discrimination, to be invalid. Id., at 276. Since any prior discrimination at SFUSD has already been remedied, and since there are no other valid reasons for discrimination on the basis of race, the affirmative action plan violates petitioners' rights to equal protection.

The District Court and Court of Appeals, perhaps recognizing that the affirmative action plan was clearly invalid, attempted to shield the plan by

misusing the law of standing. Since petitioners have standing, and since the plan has no lawful purpose, summary judgment should have been entered enjoining the plan. This petition for writ of certiorari should be granted because the judgments of the District Court and Court of Appeals contravene the established precedents of this Court.

III. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED THE DENIAL OF SUMMARY JUDGMENT ON THE ISSUE OF WHETHER PETITIONERS HAD ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION UNDER TITLE VII.

Under the burden of proof in establishing Title VII cases, plaintiffs must prove four requirements: (1) that they belong to a protected class; (2) that they applied and were qualified for a job for which the employer was seeking applicants; (3) that, despite their

qualifications, they were rejected; and (4) that, after their rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, n.6 (1981) citing McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973). More simply put, "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Burdine, 450 U.S., at 253. Petitioners have already established that they have been subject to unlawful discrimination through the use of an illegal affirmative

action plan. The District Court further erred, however, by refusing to grant summary judgment on this issue. Petitioners established each of the four elements of discrimination under Title VII, and summary judgment against them on this issue was therefore improper and contradicts the holdings of this Court.

A. Petitioners belong to a class protected by Title VII

Title VII, like the equal protection clause, applies to caucasians as equally as to other races. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976). All six petitioners are caucasian, and are challenging an affirmative action plan which discriminates against them on the basis of their race. Appendix, 46. Petitioners are therefore members of a

protected class.

B. Petitioners applied and were rejected for jobs with SFUSD for which they were qualified and for which SFUSD was seeking applicants.

Petitioners' responses to interrogatories set forth facts to show that they were each qualified for permanent positions for which SFUSD was seeking applicants. All of them were denied permanent employment with SFUSD. These facts establish the second and third elements of the McDonnell Douglas test.

C. After rejecting petitioners, SFUSD continued to seek applications from persons of comparable qualifications.

The District continued to seek applications for the permanent positions after denying each of petitioners the position. "Under the traditional

McDonnell Douglas test, the 'inference of discrimination' is not dependent on an examination of who, if anyone, was promoted instead of the plaintiff. Ordinarily, the fourth element of McDonnell Douglas is met whenever the employer continues to consider other applicants whose qualifications are comparable to the plaintiff's after refusing to consider or rejecting plaintiff." Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1359 (9 Cir. 1985). In this case, petitioners submitted facts showing that they were subject to unequal treatment because of their race. Appendix, infra, at 47. This satisfies the McDonnell Douglas test. Granting this a writ of certiorari is therefore necessary to afford

petitioners the relief to which they were entitled as a matter of law.

D. Petitioners have also established a prima facie case of discrimination by statistical evidence, thereby entitling them to summary judgment on that issue.

In support of their motion for summary judgment, petitioners set forth a number of statistics regarding the proportion of minorities employed by SFUSD, and the proportion of minorities in the qualified labor force (credentialed teachers). Despite the fact that these statistics established a prima facie case of discrimination, the District Court denied the motion for summary judgment.

Where gross statistical disparities can be shown between the relevant labor force and the actual work force, "they

alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood, 433 U.S., at 307-308, citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977).

Petitioners established that SFUSD employs 38% minorities, while the Bay Area Labor Pool is only 21% minority. SFUSD therefore employs nearly twice the percentage of minorities as are in the labor pool. Even if SFUSD only hired from teachers residing in San Francisco, there would be a difference of almost eight percent (38.5%-30.7%). This is not the result of random variation. SFUSD has a specific policy that seeks to increase the percentage of minority teachers to match the student population.

To achieve this goal, they will have to hire minority teachers almost three times as often as they appear in the labor pool. Their progress toward this statistical goal establishes a prima facie case of Title VII discrimination.

The District Court, and the Court of Appeals both ignored this Court's precedents, and denied summary judgment to petitioners on this issue. Because the District Court's determination is contrary to the law of this Court, this petition for a writ of certiorari should be granted.

IV. CONCLUSION

The guiding principles set down by this Court establish that the affirmative action plan of San Francisco Unified School District, as drafted and as

implemented, constitutes illegal discrimination in violation of the United States Constitution. The District Court and Court of Appeals for the Ninth Circuit seek to avoid invalidating this system by misusing the law of standing. Because their finding that petitioners lack standing contradicts the express precedents of this Court, a writ of certiorari should be granted. Because the District Court improperly refused to enjoin the affirmative action plan, which was illegal as a matter of law under the applicable decisions of this Court, a writ of certiorari is necessary to establish that in cases such as these, standing cannot be used as a shield to protect illegal quota systems. Since petitioners established through direct

and statistical evidence a prima facie case of discrimination under Title VII, it was improper for the District Court and Court of Appeals to deny them summary judgment on this issue as well. This petition for writ of certiorari should be granted to reassert that this Court's precedents are not to be ignored.

Dated: October 12, 1993

KAYE, GYEMANT & MCCARTHY,
A Professional Corporation

By: Robert Ernest Gyemant
Robert Ernest Gyemant
Attorney for Petitioners

APPENDIX

(contains Memorandum Opinions for United States Court of Appeals and for United States District Court)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-16579

CT/AG#: CV-90-00286-WHO

ROBERT DAVIS, JANE KENNEDY; ANGELA WINGATE; JAN SUTTER; MARY ANN WOLD; SUSAN TIBBON and ANNA MARIE KARSANT,

Plaintiffs - Appellants,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, a municipality; ART AGNOS, Mayor of San Francisco; THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, a Municipal agency; THE SAN FRANCISCO BOARD OF EDUCATION, a municipal agency; RAMON C. CORTINES; SODONIA M. WILSON, Ph.D.; LELAND Y. YEE, Ph.D.; ROSARIO ANAYA; MYRA G. KOPF; JOANNE MILLER; LIBBY DENEBEIM; and DOES 1 through 20, inclusive,

Defendants - Appellees.

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, IT is now here ordered and adjudged by this Court, that the judgment of the said District Court in this case be, and hereby is AFFIRMED.

Filed and entered July 15, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-16579
D.C. No. C90-0286 WHO

ROBERT DAVIS; JANE KENNEDY; ANGELA WINGATE; JAN SUTTER; MARY ANN WOLD; SUSAN TIBBON; and ANNA MARIE KARSANT,

Plaintiffs-Appellants,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, a municipality; ART AGNOS, Mayor of San Francisco; THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, a municipal agency; THE SAN FRANCISCO BOARD OF EDUCATION, a municipal agency; RAMON C. CORTINES; SODONIA M. WILSON, Ph.D; LELAND Y. YEE, Ph.D; ROSARIO ANAYA; MYRA G. KOPF; JOANNE MILLER; LIBBY DENEBEIM; and DOES 1 through 20, inclusive,

Defendants-Appellees.

Memorandum Opinion**

Appeal from the
United States District Court
for the Northern District of California
William H. Orrick, District Judge,
Presiding

Argued and Submitted February 2, 1993
San Francisco, California

Before: FLETCHER, REINHARDT and NOONAN, Circuit Judges.

Appellants, nonminority male and female teachers, challenged as discriminatory the employment practices of the San Francisco Unified School District ("SFUSD" or the "District") taken pursuant to a 1983 consent decree. They now appeal the district court's grant of summary judgment in favor of appellees. We affirm.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

FACTS AND PROCEDURAL HISTORY

This case has its roots in an earlier action to desegregate San Francisco's public schools. After several years of litigation, the district court in 1983 approved a consent decree entered into by the NAACP and SFUSD. In addition to prescribing other remedial measures, the decree required SFUSD to "continue to implement a staffing policy such as that contained in Policy No. 4111.1, the goal of which is 'to achieve a staff at each school site and District location that will reflect the student population of the District.'" (Excerpts of Record ("E.R.") at 325.)[1] The

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[1] According to the introduction of SFUSD's affirmative action plan, the District's commitment to affirmative action dates back to 1975, when an "affirmative Action goal" was adopted by

District subsequently adopted an affirmative action plan which incorporated that objective. The plan remains in effect.

Appellants, all current and former tenured and substitute teachers in the District, originally filed a related action in California Superior Court in January 1990, naming as defendants SFUSD, the City and County of San Francisco (the "City"), the mayor of San Francisco, the San Francisco Board of Education, and various District officials. The City removed the action to federal court, where appellants filed a first amended complaint and the suit was dismissed as

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the Board of Education as part of Policy NO. 4111.1. (E.R. at 294.) Policy No. 4111.1 has been amended somewhat over the years.

to the City, the mayor, and the other individual defendants. Appellants' second amended complaint, filed in October 1990 and styled as a class action, contains six causes of action. The first five allege: 1) violation of article I, section 8 of the California Constitution; 2) violation of 42 U.S.C. §1981; 3) violation of the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. §1983; 4) violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; 5) violation of Cal. Gov't Code §11135. The last requests declaratory relief invalidating the affirmative action plan. The district court denied appellants' motion for class certification.

Although their individual stories of

alleged discrimination, recounted below, vary, appellants, all of whom are white, all point to the affirmative action plan as the source of employment problems they have encountered at SFUSD. They claim that they have been denied longer-term and permanent positions as teachers in the District and have been subjected to discriminatory working conditions as a result of SFUSD's adherence to what they consider to be an unlawful staffing policy.

After conducting discovery, appellants and SFUSD cross-moved for summary judgment. In opposing the District's motion and in support of their own, appellants relied primarily on their responses to two sets of interrogatories, the consent decree and affirmative action

plan, and various unsubstantiated statistical reports concerning the labor market for teachers. They did not file any declarations detailing the alleged acts of discrimination and submitted only a single page of the one deposition they took prior to the close of discovery.

In support of its motion, SFUSD submitted a declaration by Roderick Hong, the District's director of personnel, summarizing the employment background of each appellant and in some cases explaining why he or she had not (or had not sooner) been hired for a position--most often because of lack of appropriate credentials. Hong does not cite affirmative action as a factor in any of these employment histories. A second declaration by Hong explains how SFUSD's

affirmative action program operates in practice.

The district court, finding that appellants had failed to produce any evidence connecting their alleged injuries to the affirmative action plan, granted summary judgment to the District and dismissed the entire action for lack of standing.[2] In doing so, the judge observed that "[p]laintiffs' failure to conduct any meaningful discovery into the injuries they have suffered and the relationship between those injuries and the challenged Decree and Plan has been their undoing." (E.R. at 384.) The court did not reach the additional

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[2] Although only SFUSD moved for summary judgment, in view of its determination that appellants lacked standing, the district court dismissed the action as to all defendants.

grounds for summary judgment urged by the District, and it denied appellants' cross-motion as moot.

Appellants have timely appealed the district court's decision.

DISCUSSION

We review de novo a district court's grant of summary judgment on the basis of standing. People for the Ethical Treatment of Animals v. Department of Health and Human Servs., 917 F.2d 15, 17 (1990). Fed. R. Civ. P. 56(c) mandates the entry of summary judgment if, after adequate time for discovery, the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex

Crop. v. Catrett, 477 U.S. 317, 322 (1986); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 884 (1990). As the Supreme Court has explained,

> Celotex made clear that Rule 56 does not require the moving party to negate the elements of the nonmoving party's case; to the contrary, 'regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.

Lujan, 497 U.S. at 885. In Lujan, in which the respondent was attempting to

establish its standing to challenge agency action under the Administrative Procedure Act, the Court emphasized the importance of a litigant's coming forth with specific facts in support of its right to sue when faced with a summary judgment motion:

> In ruling upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the

complaint.

Id. at 888.

Since Article III confers jurisdiction over only "cases and controversies," before a federal court can consider the merits of a legal claim, the person seeking to invoke jurisdiction must establish the requisite standing to sue. Whitmore v. Arkansas, 495 U.S. 149, 154 (1990). This threshold inquiry "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." Warth v. Seldin, 422 U.S. 490, 500 (1975). In order to establish standing, a plaintiff must allege a "'distinct and palpable,'" as opposed to "'abstract' or 'conjectural' or 'hypothetical,'" injury. Allen v. Wright, 468 U.S. 737, 751 (1984) (quoting

various cases). The requirement that the party seeking judicial review be among the injured "gives [the] litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973). In addition to its personal and concrete nature, a party seeking judicial review must be able to show that the alleged injury is "'fairly' traceable to the challenged action," and that "relief from the injury [is] 'likely' to follow from a favorable decision." Allen, 468 U.S. at 751 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41

(1976)).

In the district court, appellants relied heavily upon the Supreme Court's decision in Martin v. Wilks, 490 U.S. 755 (1989), which held that employees could challenge an employer's actions taken pursuant to a previously entered consent decree as racially discriminatory even if the employees were not parties to the litigation that resulted in the consent decree. Wilks was in large part overruled by section 108 of the Civil Rights Act of 1991, which prohibits such challenges if the would-be plaintiffs had a reasonable opportunity to object to the decree or their interests were adequately represented by another party. 42 U.S.C. §2000e-2(n); Estate of Reynolds v. Martin, 985 F.2d 470, 475 n.2 (9th Cir.

1993). Appellants have not addressed on appeal the impact of the amendment on this litigation. We assume only for the purposes of discussion that section 108 does not bar this action.

In any event, Wilks doe snot suggest that every employee has automatic standing to challenge an employer's hiring and promotion practices under a consent decree. Rather, the employee still must satisfy traditional standing criteria. A review of the claims made by the seven[3] teachers reveals, as the district court found, that none of the appellants has demonstrated injury to themselves resulting from the plan or

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[3] The second amended complaint names nine plaintiffs. Two were dismissed from the action prior to the court's grant of summary judgment.

even alleged facts to counter the District's showing that the employment problems he or she faced were not traceable to the plan.[4]

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[4] In analyzing whether appellants have standing, as the district court did, we are mindful that the questions of whether appellants have presented triable claims of employment discrimination and whether they have standing to sue are closely related. "Insofar as [a] statute defines [a] duty, it characterizes the injury and, if not explicitly, implicitly describes those who are entitled to enforce it." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1513 (9th Cir. 1992).

We further note that the Supreme Court's recent opinion in Northeastern Fla. Chapter of the Associated General Contractors v. City of Jacksonville, No. 91-1721, 1993 U.S. LEXIS 4025 (June 14, 1993), which came down after this case was argued and submitted, does not alter our standing analysis. In General Contractors, nonminority contractors alleged that they were unable to bid on contracts because of Jacksonville's minority set-aside program. Id. at *6, *23 (plaintiffs would have bid on the contracts "but for" the set-aside ordinance). The Court held that the

A. Robert Davis

In his interrogatory responses, Robert Davis, who has been a permanent teacher with the District since 1985,

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contractors had standing to challenge the ordinance: "To establish standing . . . a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." Id. at *19 (emphasis added).

By contract, in the case before us, plaintiffs were not barred from applying for the jobs they allegedly sought. They were not "excluded from consideration" as a result of a facially "discriminatory" classification. Moreover, unlike in General Contractors, as is discussed below, none of the plaintiffs here has succeeded in establishing a connection between his or her failure to obtain a job and the District's affirmative action program. Instead, plaintiffs assert generalized difficulties in obtaining employment that cannot be traced to the affirmative action plan. Cf. id. at *21 (distinguishing Warth v. Seldin, 422 U.S. 490 (1975) (holding no standing where plaintiffs failed to demonstrate that their inability to locate housing resulted from challenged zoning ordinance)).

claims he was first subjected to discrimination "sometime between June of 1980 when I was laid off for the second time and September of 1984 when I was re-employed." (E.R. at 91.) He further claims that the SFUSD "should have rehired me between 1980 and 1983 for positions I was qualified to teach, but instead hired or rehired persons who were either new to the SFUSD or had less seniority than I." (Id. at 188.) In response to an interrogatory requesting more detailed information regarding these claims, David responded that there was "nothing to add." (Id.)

Davis has failed to identify the jobs he allegedly sought, has produced nothing to show he applied for them, and has not named the less senior candidates

who were selected to fill them. Even assuming the trust of his allegations, he does not explain how the affirmative action plan played a role in the employment decision he challenges, other than that the SFUSD engaged in hiring and promoting "according to racial criteria." (Id. at 187.) Clearly, under the above principles, Davis' conclusory statements are insufficient to support his standing to challenge the affirmative action plan.

B. Jane Kennedy

Jane Kennedy also has held a permanent position with the District since 1985. She claims that she should have been reinstated as an English-as-a-second-language (ESL) or English teacher at Galileo High School in 1979 or 1980, and that instead she was retained as a

substitute. She does not explain how these alleged deprivations relate to the affirmative action plan or the consent decree, both of which postdate the actions in question.

Kennedy appears more concerned with events which transpired after she was hired for a permanent position at Galileo in 1985. She states that after being hired she taught ESL classes "with outstanding professional evaluations until September 1988 when I was told I no longer qualified to be an ESL teacher because I had declined to undergo the ultra vires, unpaid and exploitative bilingual department mandated designated process." (Id. at 108.) According to the declaration submitted by Roderick Hong, Kennedy has refused to complete ESL

training and therefore does not meet the District's requirements to each ESL. Kennedy seems to be contending that the ESL training requirement has been unlawfully imposed. She does not explain how her experiences relate to the affirmative action plan or race discrimination the District's employment practices, however.

C. Angela Wingate

Angela Wingate probably comes closest to meeting the requirements for standing, but she has failed to identify a specific job for which she applied and that was awarded to a less senior or less qualified minority teacher.

Wingate has been employed as a day-to-day and long-term substitute teacher with the District since 1985. She claims

she has inquired regularly about openings for permanent positions with the District since the spring of 1986. Asked in an interrogatory to identify specific instances of unlawful discrimination by SFUSD, however, she merely responded that she "regard[s] each and every Social Studies appointment made since May, June of 1986 of persons of lesser seniority than I as unlawfully lost opportunities." (Id. at 142.)

Wingate does recount several experiences in which she as told or overhead remarks to the effect that it is more difficult for whites to obtain permanent positions with SFUSD. She claims, for example, that she was sent to a "sham" interview by a personnel official who remarked to Wingate how

"difficult it was to appoint whites." (Id. at 237.) She claims that another official told her that the District's delay in responding to her application to teach summer school was due to the fact that there had been too few minority applicants and that the District would therefore be advertising again. Wingate further states, without offering any substantiation, that Roderick Hong, the director of personnel, is "[o]n record as admitting he does not send whites to interviews and actively seeks their disadvantage and injury by his behavior." (Id.)

Wingate also related an experience in which a principal told he she cold not be retained for the following year (presumably as a permanent teacher)

because there would be "no chance of getting two whites in the same credentialed area appointed to [the] school." (Id. at 244.) Wingate does not state that she actually applied for this position, however, or she was eventually appointed to it. Wingate has pointed to no specific employment opportunity she applied for that was awarded to a minority with lesser credentials. We conclude she has failed to demonstrate a concrete injury traceable to the affirmative action plan. Judge Orrick's observation that plaintiffs' failure to conduct meaningful discovery has been their undoing seems especially relevant in Wingate's case.

D. Jan Sutter

Jane Sutter, a computer teacher, was

formerly employed by SFUSD as a day-to-day and long-term substitute. Following the 1988-89 school year, the principal of Sala Burton Academic High School declined to rehire him. In his interrogatory responses, Sutter states:

> I was removed from my position as a classroom teacher at Burton High School out of racial prejudice and without just cause.
>
> I was subjected to continual harassment, slander and libel by a minority administrator because I attempted to apply for a permanent position and because of my alleged ethnic, racial and national background. This harassment included willful lodging of false and malicious charges of racial

> slurs against the administrator herself, Fredna Bell Howell, in front of my students with my employer SFUSD.

(Id. at 199.) One such charge was that Sutter told a student to "[g]et your black ass out of here." (Id. at 121.) The District and Sutter agree that the stated reason he was not rehired as a long-term substitute after the end of 1988-89 school year was because administrators at Burton concluded that he was unable to interact positively with minority students. Sutter and the District are at odds as to whether the reason was based on false charges.

At bottom, Sutter's discrimination claim is that his employment opportunities at SFUSD were unjustifiably

curtailed as a result of what he considers to have been racially motivated and false charges against him. He has not shown how the racial harassment he allegedly suffered at the hands of Burton High School;s principal is related to the affirmative action plan. Although he points to minorities who were hired to each computer classes at Burton and claims they were less qualified than he, once again, no details have been offered (for example, the others' credentials and seniority versus his own) to substantiate the allegations.

E. Mary Ann Wold

Mary Ann Wold was laid off from the permanent teaching position she held at SFUSD in 1979, then worked in a substitute capacity, and, after applying

unsuccessfully for a position in 1984, was rehired as a permanent teacher in 1985, Since then, she has applied for no other position.

Wold asserts that while she was substitute teaching, others with less seniority were hired for permanent positions that she was qualified to teach, including some individuals who were designated as bilingual even though they were not in fact bilingual. Although she names a number of these individuals, she doe snot contend that any was hired to fill the position for which she applied in 1984. Nor does she give specific reasons why she should have been hired in lieu of any of them; she merely states in conclusory terms that their seniority was the same as or junior

to hers, that some held credentials similar to hers and were hired for positions she "could have filled," and that others were hired to fill positions "for which I was not credentialed, but then as near as I can tell, neither were they." (Id. at 215.) Thus characterized, Wold's alleged injury lacks sufficient concreteness and specificity to withstand the standing analysis.

F. Susan Tibbon

Susan Tibbon is an art instructor who has worked in a substitute capacity for SFUSD since 1973. She has applied unsuccessfully for various permanent and summer school positions over the years and claims she was first discriminated against when she was rejected for a

summer school job in 1984. Although in her interrogatory responses she asserts that she has been sent on "sham" interviews that were "humiliating and embarrassing" and mentions a black teacher who allegedly harassed her during one such interview, she offers nothing to connect her failure to obtain a permanent position with the affirmative action plan. She does not even assert as a general matter that SFUSD has hired art teachers with less seniority or inferior credentials during the period she has sought permanent status.

G. Anna Marie Karsant

Anna Marie Karsant was laid off by the District in 1979, worked as a substitute teacher, and was rehired for a permanent teaching position in 1989.

Her interrogatory responses are vague and fail to explain her alleged injury. She states merely that she "wanted a job and didn't get one" and that she should have been rehired during the period when she was substitute teaching as other art teachers died, retired or quit. (Id. at 223.) Karsant also appears to be complaining about the ESL credentialing process, bilingual education, and what she characterizes as the District's policy of "skipping over minorities when layoffs come." (Id. at 226). She does not tie any of these various complaints to her own employment experience.

CONCLUSION

Because we hold that appellants lack standing to bring this action, we do not reach their additional contentions on

appeal that they have made out a prima facie case of employment discrimination under Title VII and that they are entitled to have the affirmative action plan declared unlawful.

The district court's grant of summary judgment is AFFIRMED.

DO NOT PUBLISH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION
AND ORDER

No. C-90-0286 WHO

ROBERT DAVIS; JANE KENNEDY; ANGELA WINGATE; ANNA MARIE KARSANT; JAN SUTTER; MARY ANN WOLD; SUSAN TIBBONS,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipality; THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, a municipal agency; and THE SAN FRANCISCO BOARD OF EDUCATION, a municipal agency,

Defendants.

AND RELATED ACTION NOS.
C-78-1445 WHO and C-91-0825 WHO

Plaintiffs, seven non-minority

teachers, bring this civil rights action against defendants, the City and County of San Francisco, the San Francisco Unified School District (the "District"), and the San Francisco Board of Education, challenging the affirmative action provision of the 1983 Consent Decree (the "Decree") that the San Francisco NAACP, the District, and the California State Board of Education, entered into as part of this Court's settlement of action No. C-78-1445 WHO. In the instant case, plaintiffs have moved for partial summary judgment and the District has moved for full or partial summary judgment. Upon review of written and oral argument of counsel and declarations submitted in support thereof, the Court grants the District's motion for summary judgment on

the grounds that plaintiffs lack standing to bring this suit. The Court's finding that plaintiffs lack standing moots their motion for partial summary judgment.

I.

Plaintiffs identify the basic issue as whether defendants maintained a policy and practice of employment discrimination against all nonminorities by basing employment decisions on a scheme of matching racial composition of staff and student bodies in the District in violation of the holding in Hazelwood School District v. United States, 433 U.S. 299 (1977). They claim adverse effects from the remedial hiring policies of the Affirmative Action Plan (the "Plan") adopted by the District pursuant to the Decree. The complaint alleges

violations of: (1) Article 1, Section 8, Constitution of the State of California; (2) 42 U.S.C. § 1981; (3) 42 U.S.C. § 1983; (4) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq.; (5) § 11135 of the California Government Code. Plaintiffs also request declaratory relief to invalidate the Plan.

The District bases its motion for full or partial summary judgment on seven separate grounds: (1) plaintiffs lack standing to challenge the Plan; (2) the applicable statutes of limitations bar plaintiffs' claims; (3) plaintiffs' Title VII claims fail because all but one plaintiff (Wingate) lacks the prerequisite "right to sue" letter; (4) no plaintiff has made or can demosntrate

a prima facie case of intentional discrimination or establish a causal connection between the discrimination allegedly suffered and the Decree or Plan; (5) plaintiffs' § 1981 and § 1983 claims fail because they have introduced no evidence of discriminatory intent or a link between the Plan or the Decree and the discriminatory action; (6) the Supremacy Clause of the Constitution of the United STates bars plaintiffs' state law claims; and (7) the Plan is lawful and violates no law cited by plaintiffs. The Court addresses only the first ground, namely, whether plaintiffs have standing to bring this action.

II.

Plaintiffs' lack of standing deprives this Court of jurisdiction over

this action and moots both parties' arguments as to the legality of the Decree or the Plan.

"Standing is a threshold qquestion in every case before a federal court." McMichael v. County of Napa, 709 F.2d 1268, 1269 (9th Cir., 1983). Before a plaintiff can invoke the judicial process he must show "'such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends. . .'" Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

Standing involves both constitutional and discretionary limitations. To bring a case in federal court, a party must, at a minimum,

satisfy Article III's case or controversy requirement. If the party fails to show standing, the case must be dismissed. "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." Whitmore v. Arkansas, 110 S.Ct. 1717, 1723 (1990).

To meet his constitutional burden, a plaintiff must clearly demonstrate that he had suffered an injury in fact. That injury "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical." Id. (Quotations and internal citations

omitted.)

Additionally, "the litigant must satisfy the 'causation' and 'redressability' prongs " of Article III by showing, at a minimum, "that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.'" Id. (quoting Simon v. Eastern Kentucy Welfare Rights, Org., 426 U.S. 26, 38, 41 (1976)).

Plaintiffs fail to establish standing here. They argue that individual employees can sue their employer for employment discrimination even if the employer took its allegedly discriminatory actions pursuant to a federal court's consent decree. Martin v. Wilks, 490 U.S. 755 (1989) (white

firefighters who did not participate in the drafting of consent decrees designed to increase the number of black firefighters not precluded from challenging employment decisions taken pursuant to those decrees). Plaintiffs reliance on Wilks misses the point of the standing argument. The District does not argue that the Decree immunizes the District from suits by teachers injured by actions taken pursuant to that Decree. Instead, the District argues that these particular nonminority teachers lack standing because they have failed to show that the programs of which they complain have injured them in any legally cognizable way.

Plaintiffs offer only conclusory allegations of the injuries they

purportedly suffered because of the District's impermissibly discriminatory behavior. Such claims fail to satisfy plaintiffs' burden at the summary judgment stage. Moreover, plaintiffs never tie the discrimination that they supposedly suffered to the provisions of the Decree or the Plan.

The evidence with which plaintiffs attempt to show their standing is as follows. Plaintiffs assert they were told there were no openings for teachers with credentials to teach "English as a Second Language," even though such classes lacked staffing as school opened each fall from 1979 through 1985. Plaintiffs further assert that minorities with lower academic attainment, poorer job evaluations, less experience, and no

District seniority have regularly been employed to plaintiffs' detriment and that minorities have reveived permanent positions while plaintiffs remain as long-term substitutes or day-to-day substitutes who are routinely hired in the fall and fired in June, even after successfully completing one year. Plaintiffs submit no declarations or other evidence to support their bald assertions.

Some individual plaintiffs list employment opportunities that they believe they were unlawfully denied. Jane Kennedy states that she lost her qualification to teach English as a second language when she refused to undergo the bilingual department's mandated qualification process. Kennedy

never ties the bilingual department's actions to either the Plan or the challenged portion of the Decree, failing to establish the requisite causal connection.

Mary Ann Wold states she has not applied for a new position since September 1985. Angela Wingate asserts that she has regularly asked the personnel office about all openings since the spring of 1986, and counts every social studies appointment of a less senior person as an unlawfully lost employment opportunity, but provides no evidence as to dates or specific job opportunities. Neither of these plaintiffs submit sufficient evidence on which to establish standing.

Robert Davis claims he was

pretextually laid off and suffered financial losses due to the race-based employment practices. His contentions are wholly conclusory and unsupported by sufficient facts to meet Article III's requirements. Anna Marie Karsant's declarations are even more open-ended and their vacuity similarly prevents this Court from exercising jurisdiction over her aciton.

Jan Sutter and Susan Tibbons allege more specific injuries. Sutter states he was denied the opportunity to apply or interview for the open position he held under contract at Burton High School as a long-term substitute during two consecutive school years (1987-1988, 1988-1989) and was denied any employment as a day-to-day substitute during the

regular school year 1989-1990 after attempting to seek redress by a grievance for his situation at Burton. Sutter further claims he was removed from his position as a classroom teacher at Burton High School out of racial prejudice and without just cause. Tibbons asserts she was unlawfully denied employment opportunities each year from 1984 through 1989 and has suffered emotional upset at being unable to make a long-term commitment to students and faculty members at her schools.

Neither Tibbons nor Sutter present facts to support claims they have suffered a legally cognizable injury. Neither show they were qualified for the positions for which they applied, nor that the District filled the positions

after it rejected their applications.

Even more dispositive, neither Sutter nor Tibbons states how their injuries can be attributed to the Decree or the Plan. Tibbons holds only one teaching credential for art. She has identified no other teacher holding only a single-subject teaching credential who was hired into a permanent teaching position with the District since 1987. Sutter states that racial animus, not affirmative action, motivated the District's discrimination against him. In short, neither Sutter nor Tibbons introduce any evidence to show that the District relied on its Plan or the Decree when making its decisions not to hire them.

Although plaintiffs need not show

their injuries are directly traceable to defendants' actions, they must show them to be "fairly traceable" to those actions. Allen v. Wright, 468 U.S. 737, 751 (1984). Here, "the total absence of support for plaintiffs' claim that the challenged actions have injured them puts the court in the completely untenable position of having to speculate both as to injury and causal relationship. Such pure speculation is an unacceptable basis upon which to ground a party's standing." Natural Resources Defense Council, Inc. v. Burford, 716 F.Supp 632, 638 (D.D.C. 1988); see also Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 42-44 (1976) ("unadorned speculation will not suffice to invoke the federal judicial power").

As the foregoing review manifests, plaintiffs have failed to produce anything other than generalized statements to show the existence of concrete injuries fairly attributable to the Decree and resulting Plan. Plaintiffs initiated this action well over a year ago. Nevertheless, the only evidence they submit as to their standing to bring suit is their answers to interrogatories propounded by defendants in the Spring of 1990.

Although plaintiffs' broad inferences might have been enough to withstand a motion to dismiss, they fail to support plaintiffs' claim of standing at the summary judgment stage. In United STates v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669

(1973), the Supreme Court found the plaintiffs' allegations sufficient to survive a motion to dismiss, but noted that upon a motion for summary judgment the plaintiff might have to show injury with greater specificity. Id. at 688-90 n.15. See also Simon, 426 U.S. at 45 n.25 (Court acknowledged it might have decided SCRAP differently had that case come before it on a motion for summary judgment.)

Plaintiffs bear the burden of proof on standing. Whitmore v. Arkansas, 110 S.Ct. 1717, 1723 (1990). Therefore, on summary judgment the defendant-moving party satisfies its burden by "pointing out to the district court [] that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v.

Catrett, 477 U.S. 317, 325 (1986). The District has met this burden.

Plaintiffs fail to produce any evidence showing that the Plan has caused them to suffer any legally cognizable injury. Plaintiffs' failure to conduct any meaningful discovery has been their undoing. Their action cannot survive a motion for summary judgment on the grounds they lack standing. See Celotex, 477 U.S. 317; Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986);. Accordingly,

IT IS HEREBY ORDERED that:

1. The District's motion for summary judgment on the grounds that plaintiffs lack standing to bring their suit is GRANTED.

2. Plaintiffs' motion for partial summary judgment is DENIED as moot.

3. Plaintiffs' action is DISMISSED as to all defendants because plaintiffs have failed to demonstrate the threshold standing criteria or injury and causation required to invoke this Court's jurisdiction.

Dated: September 11, 1991.

\s\
William H. Orrick
United States District Judge

Supreme Court, U.S
FILED
NOV 12 1993
OFFICE OF THE CLERK

No. 93-593

In The

Supreme Court of the United States

October Term, 1993

ROBERT DAVIS, et al.,

Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the Ninth Circuit correctly determined that petitioners failed to sustain their burden, in opposition to a motion for summary judgment, of identifying specific facts to establish their standing to challenge remedial provisions of a desegregation consent decree affecting some but not all hiring and promotion decisions.

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No. 93-593

In The

Supreme Court of the United States

October Term, 1993

ROBERT DAVIS, et al.,

Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioners Robert Davis, Jane Kennedy, Angela Wingate, Anna Marie Karsant, Jan Sutter and Susan Tibbons.

STATEMENT OF THE CASE

In this action, the six petitioners sought to challenge a fifteen-year-old consent decree and a related affirmative action plan. Petitioners argued that the Decree and plan

unfairly burdened their rights as non-minority teachers.[1] Throughout the litigation, however, petitioners were remarkably disinterested in producing the facts necessary to establish their case. They conducted virtually no discovery. Petitioners failed to identify any facts connecting the Consent Decree or plan to any employment injury they identified.

Based on this failure of proof, in June 1991, respondents moved for summary judgment on the ground, among others, that petitioners lacked standing. Not one of the petitioners submitted a declaration in opposition to respondents' motion for summary judgment.

Both the trial court and Ninth Circuit ruled that petitioners lacked standing. In reality, however, the failure of evidence was more fundamental: There was no evidence that the circumstances of the petitioners and their alleged injuries had any relationship at all with the Consent Decree.

The background of this action begins in June 1978. At that time, the San Francisco branch of the National Association for the Advancement of Colored People brought an action alleging that the San Francisco Unified School District ("SFUSD") maintained a segregated school system. The complaint sought the desegregation of San Francisco public schools.

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[1] Initially, there were nine plaintiffs. Two of the plaintiffs were dismissed pursuant to stipulation. Plaintiff Mary Ann Wold did not join the petition for certiorari. Additionally, the City and County of San Francisco was dismissed as a defendant by stipulation.

After extensive litigation, by order dated May 1983, the district court approved a Consent Decree executed by the parties. The primary goal of the Consent Decree was to benefit the children of San Francisco. Paragraphs 34 and 35 of the decree concerned desegregation of faculty, administration and other SFUSD staff. Paragraph 34 required SFUSD to:

> continue to implement a staffing policy such as that contained in Policy No. 4111.1, the *goal* of which is "to achieve a staff at each school site and District location that will reflect the student population of the District." (Emphasis added.)

Paragraph 35 of the decree provides:

> The S.F.U.S.D. shall assure that faculty and other staff will be equitably assigned throughout the District, within the meaning of applicable legal standards.

The decree was not appealed.

Petitioners – all current or former teachers in SFUSD – alleged discrimination in hiring and promotions arising out of SFUSD's affirmative action plan ("the Plan"). Petitioners conceded that the Plan was required by the Consent Decree; in other words, petitioners' challenge to the Affirmative Action Plan is necessarily a challenge to the Consent Decree that required the Plan. Petitioners never asserted they suffered any discrimination independent of the Plan.

Petitioners filed their original complaint in California Superior Court on January 29, 1990. The action was removed to federal district court. Petitioners filed a first amended complaint on February 1, 1990 and a second

amended complaint on October 3, 1990. The second amended complaint alleged six claims for relief: (1) violation of article I, section 8 of the California Constitution; (2) violation of 42 U.S.C. section 1981; (3) violation of 42 U.S.C. section 1983; (4) violation of Title VII of the Civil Rights Act of 1964; (5) violation of California Government Code section 11135; and (6) a request for declaratory relief invalidating SFUSD's Affirmative Action Plan.

Petitioners moved for class certification on July 27, 1990. The District Court denied the class certification motion.

Through discovery, respondents sought to uncover how the individual petitioners believed they were injured by the Consent Decree and Affirmative Action Plan. This discovery revealed that not a single petitioner could identify any specific facts linking the Decree or Plan to any cognizable employment injury.

None of the petitioners introduced probative evidence that SFUSD's alleged failure to hire or promote them was influenced in any way by the Consent Decree or Affirmative Action Plan. Nor, in most cases, were plaintiffs even able to point to positions for which they were qualified but not hired. Their individual claims involved various unconnected complaints regarding seniority issues or SFUSD's "English as a second language" program.

Petitioners took virtually no discovery in this case. Not one set of interrogatories was propounded by any petitioner. Not one deposition was taken of any school principal making hiring decisions. No request was made for any data regarding applicant flow or hiring, or any

other statistics. The only discovery taken by petitioners consisted of one brief deposition (which consisted mainly of authenticating SFUSD's Affirmative Action Plan), one brief request for production of documents (which simply sought the Affirmative Action Plan and a few related policies), and one request for admissions (seeking acknowledgment that the Superintendent of Schools had written an article in a local newspaper).

After the close of discovery, both sides moved for summary judgment. Petitioners sought summary judgment on their declaratory relief claim that the Plan was unlawful. None of the petitioners filed a declaration in support of the motion. Rather, petitioners relied on their answers to SFUSD's interrogatories, a single page from the transcript of the only deposition taken by petitioners in this action, as well as a smattering of unauthenticated statistics, most of which were based on the 1980 census.

SFUSD moved for summary judgment or partial summary judgment on a number of independent grounds: (1) petitioners' lack of standing to challenge the Plan and the Consent Decree Judgment; (2) the bar of the applicable statutes of limitations; (3) the lack of merit of petitioners' state claims; (4) the lack of merit of petitioners' section 1981 claims, given that public employment in California is based on statute, not contract; and (5) the failure of petitioners to demonstrate any discrimination or causal link between the Consent Decree and petitioners' alleged injury.

In opposing SFUSD's summary judgment motion, petitioners advanced what they characterized as factual statements about the individual petitioners. The evidence

upon which petitioners relied, however, consisted almost exclusively of conclusory statements without supporting evidence. The sole source of these statements was petitioners' responses to the interrogatories propounded by SFUSD.

In support of their summary judgment motion, and in opposition to petitioners' motion, respondents filed, in addition to other evidence, two declarations by Roderick Hong, SFUSD's personnel officer. Mr. Hong explained that the Plan sets forth goals for SFUSD and not quotas that must be met. Specifically, Mr. Hong testified about the application of the plan:

> When there are two otherwise equally qualified applicants for a particular [long-term substitute teacher position], the Plan allows the principal to consider the District's affirmative action plan as one of the factors in his or her decision. A principal is never required to choose one candidate over another based solely on the applicant's race. This is also true with respect to the hiring of permanent teachers. The affirmative action plan is simply one factor that the District may consider when it appoints otherwise equally qualified teachers to permanent positions.

Petitioners submitted no evidence to dispute Mr. Hong's testimony regarding application of the Plan.

The district court granted SFUSD's summary judgment motion on the ground that petitioners had failed to meet their burden of identifying specific facts demonstrating they have standing to challenge the Consent

Decree or Plan. After noting the lack of discovery conducted by petitioners and the conclusory nature of their allegations, the district court observed:

> Plaintiffs bear the burden of proof on standing. *Whitmore v. Arkansas*, 110 S.Ct. 1717, 1723 (1990). Therefore, on summary judgment the defendant-moving party satisfies its burden by "pointing out to the district court [] that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The District has met this burden. ¶ *Plaintiffs fail to produce any evidence showing that the Plan has caused them to suffer any legally cognizable injury. Plaintiffs' failure to conduct any meaningful discovery has been their undoing.* Their action cannot survive a motion for summary judgment on the ground they lack standing. (Emphasis added.)

On September 12, 1991 the district court entered judgment in favor of respondents. Petitioners appealed.

The Ninth Circuit affirmed in an unpublished opinion, observing that this Court has "emphasized the importance of a litigant's coming forth with specific facts in support of its right to sue when faced with a summary judgment motion." *Citing Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 884 (1990). While petitioners bear the burden of establishing their standing, the Court of Appeals noted that petitioners' evidence consisted primarily of conclusory statements and that none of the petitioners had pointed to any facts establishing that the challenged Consent Decree or the Plan had any connection with the employment problems petitioners cited. Like the district court, the Court of Appeals concluded that petitioners

had failed to produce facts establishing their standing to challenge the Consent Decree and Plan.

The Ninth Circuit distinguished this case from *Northeastern Fla. Chapter of the Associated General Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993), upon which petitioners rely almost exclusively in their petition:

> We further note that the Supreme Court's recent opinion in *Northeastern Fla. Chapter of the Associated General Contractors v. City of Jacksonville*, [113 S.Ct. 2297 (1993)], which came down after this case was argued and submitted, does not alter our standing analysis. In *General Contractors*, non-minority contractors alleged that they were unable to bid on contracts because of Jacksonville's minority set-aside program. *Id.* at *6, *23 (plaintiffs would have bid on the contracts "but for" the set-aside ordinance). The Court held that the contractors had standing to challenge the ordinance: "To establish standing . . . a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy *prevents* it from doing so on an equal basis." *Id.* at *19 (emphasis added).
>
> By contrast, in the case before us, plaintiffs were not barred from applying for the jobs they allegedly sought. They were not "excluded from consideration" as a result of a facially "discriminatory" classification. Moreover, unlike in *General Contractors*, as is discussed below, none of the plaintiffs here has succeeded in establishing a connection between his or her failure to obtain a job and the District's affirmative action program. Instead, plaintiffs assert generalized difficulties in obtaining employment that cannot be

traced to the affirmative action plan. *Cf. id.* at 422 U.S. 490 (1975) (holding no standing where plaintiffs failed to demonstrate that their inability to locate housing resulted from challenged zoning ordinance).

In relying on *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 113 S.Ct. 2297 (1993), petitioners fail to confront the Ninth Circuit's persuasive distinction of that case.

REASONS FOR DENYING THE WRIT

I.

APPLYING SETTLED PRINCIPLES OF STANDING, THE NINTH CIRCUIT CORRECTLY HELD THAT PLAINTIFFS LACKED STANDING TO CHALLENGE THE CONSENT DECREE AND AFFIRMATIVE ACTION PLAN

The Court of Appeals held that petitioners lack standing to challenge the Consent Decree and the Plan. In doing so, the Court of Appeals correctly applied well-settled jurisdictional principles.

This Court has consistently emphasized that standing is a fundamental component of Article III, which limits the judicial power of federal courts to resolving "cases and controversies." The Article III standing requirement must be met even where a statute entitles plaintiffs to bring a private cause of action. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Moreover, the "threshold inquiry into standing in no way depends on the

merits of the [petitioner's] contention that particular conduct is illegal. *Whitmore v. Arkansas*, 110 S.Ct. 1777, 1723 (1990) (internal quotation marks omitted).

This Court has explained the fundamental importance of standing to a federal court's jurisdiction:

> The requirement of actual injury redressable by the court serves several of the "implicit policies embodied in Article III." It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.
>
> The standing requirement serves other purposes. Because it assures an actual factual setting in which the litigants asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-42 (1986) (in cases involving constitutional challenges, the Court has "strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversarial presentation and a full development of the relevant facts.")

The Ninth Circuit correctly observed that petitioners bear the burden of demonstrating they have standing to challenge the Consent Decree and the Plan. *Warth v.*

Seldin, 422 U.S. 490, 517-18 (1975). As the Ninth Circuit explained, to establish standing, a plaintiff must satisfy three minimum requirements, and must do more than merely tender general allegations. *See Whitmore v. Arkansas*, 110 S.Ct. at 1723. The Court of Appeals properly determined that petitioners failed to show they could satisfy these requirements.

First, petitioners must establish that they "personally [have] suffered some actual injury or threatened injury as a result of the putatively illegal conduct." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). The injury "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 110 S.Ct. at 1723. In other words, petitioners must allege an injury to themselves that is "distinct and palpable," *Warth*, 422 U.S., at 501, as opposed to merely "[a]bstract." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The purported injury must be real or imminent, not "conjectural" or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Plaintiffs must show personal injury so that the judicial process does not become a "vehicle for the vindication of value interests." *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

Second, petitioners must demonstrate that the injury "fairly can be traced to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). In other words, there must be a direct causal connection between plaintiff's asserted injury and defendant's challenged action. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Third, petitioners must demonstrate "a substantial likelihood" that the requested relief will redress the

injury. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 75 (1978); *Simon*, 426 U.S. at 38.

In this case, the district court determined that petitioners lacked standing in connection with a motion for summary judgment. In support of that motion, respondents identified specific parts of the record to show there was no factual support for the claim that any petitioner had been injured by the Consent Decree or Affirmative Action Plan. In doing so, respondents sustained their initial burden of demonstrating the absence of evidence to support petitioners' standing. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In light of respondents' showing, the burden then shifted to petitioners to "designate 'specific facts showing that there is a genuine issue for trial' " on the issue of standing. *Celotex*, 477 U.S. at 324. Not surprisingly, because petitioners conducted almost no discovery, they failed to satisfy this burden. Their assertions regarding alleged injuries they suffered were conclusory. Nor did petitioners produce specific facts supporting the contention that any of their alleged injuries had any causal connection to the Plan or the Consent Decree. Indeed, not one of the petitioners even bothered to submit a declaration alleging injuries from the Consent Decree or Plan.

In seeking certiorari, petitioners have dropped any pretense that they presented specific facts showing their alleged injuries were caused by the Consent Decree or the Plan; in fact, the petitioners do not even discuss the facts regarding their individual employment situations. Rather, in an attempt to make up for their lack of discovery, petitioners now take the untenable position that there is

an irrebuttable presumption every District teacher has standing to challenge the Consent Decree and the Plan.

Plaintiff's position is directly contrary to the recent teachings of this Court:

> Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. *We presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record.* It is the responsibility of the complainant to clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. (Emphasis added.)

Renne v. Geary, 111 S.Ct. 2331, 2336 (1991) (citations and internal quotation marks omitted); *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596, 608 (1990) ("It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings' but rather 'must affirmatively appear in the record.' ").

Petitioners' startling new view of Article III standing is premised entirely upon a misreading of *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*, 113 S.Ct. 2297 (1993). *General Contractors* is clearly distinguishable from this case.

In *General Contractors*, an association of individuals and firms in the construction business challenged an ordinance *requiring* that ten percent of the amount spent on city contracts be set aside each fiscal year to minority business enterprises. "Once projects were earmarked for MBE bidding by the city's chief purchasing officer, they were 'deemed reserved for minority business enterprises

only.' " 113 S.Ct. at 2299. Accordingly, it was indisputable that the challenged ordinance precluded plaintiff's members from bidding on or being awarded 10% of the contracts awarded by the City. In its complaint, the association alleged that its members regularly bid on and performed city construction work and that they would have bid on designated set aside contracts if not for the restrictions imposed by the challenged ordinance. 113 S.Ct. at 2304. Given the mandatory nature of the set-aside program and the allegations of the association, this Court concluded it was improper to dismiss the action for lack of standing.

General Contractors is distinguishable from this case. Unlike the mandatory set-asides challenged in *General Contractors*, the Consent Decree and Plan speak of *goals*. The Plan does not establish a certain percentage of teaching positions for which white applicants may not apply. In fact, contrary to petitioners' assertion, nothing in the Plan even requires SFUSD to consider race when making a particular employment decision. Rather, the goals of the Plan are merely one factor that SFUSD *may* consider. Accordingly, the presumption in *General Contractors* that the set-aside program caused a redressable injury simply does not apply here; rather, the issue of whether the Plan was a factor in a particular hiring decision is factual.

That distinction is particularly critical because SFUSD, unlike the defendant in *General Contractors*, challenged petitioners' standing through a summary judgment motion rather than through a motion to dismiss. *General Contractors* makes clear the fundamental nature of this distinction:

> In its complaint petitioner alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able. Complaint ¶¶ 9, 46. *Because those allegations have not been challenged (by way of a motion for summary judgment, for example), we must assume that they are true.* See *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, ___ n.3 (slip op. at 7, n.3); *Pennell v. San Jose*, 485 U.S. 1, 7 (1988). Given that assumption, and given the legal standard we have reaffirmed today, it was inappropriate for the Court of Appeals to order that petitioner's complaint be dismissed for lack of standing.

113 S.Ct. at 2304-05 (emphasis added).

Thus, *General Contractors* makes a clear distinction between the differing assumptions and burdens that apply at the motion to dismiss and summary judgment stages of an action. Respondents did not challenge the allegations in petitioners' complaint regarding standing through a motion to dismiss. Rather, SFUSD challenged those assertions in a summary judgment motion. In order to survive the motion, petitioners were required to point to facts supporting those generalized allegations. As the Court of Appeals explained, petitioners pointed to no evidence demonstrating that the Plan was considered in connection with any of the employment decisions challenged by petitioners. Nor did petitioners identify any specific facts to show that the Consent Decree or Plan posed a real and immediate threat of harm to them with respect to any future employment decision. *See Whitmore v. Arkansas*, 110 S.Ct. at 1725 ("A threatened injury must be 'certainly impending' to constitute injury in fact").

Accordingly, the Court of Appeals properly concluded that petitioners lacked standing.

This conclusion is supported by *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). In *Lujan*, the Court explained the differing standards a plaintiff must meet to establish standing at the pleading stage and at summary judgment:

> The party invoking federal jurisdiction bears the burden of establishing these [standing] elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. *In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts . . . which for purpose of the summary judgment will be taken to be true.*

112 S.Ct. at 2136-37 (emphasis added, internal quotation marks and citations omitted).

Here, petitioners utterly failed to sustain their burden of establishing their standing to challenge the Consent Decree or Affirmative Action Plan. Not one of the petitioners submitted an affidavit, or any other evidence, connecting the Consent Decree or Affirmative Action Plan to a challenged employment decision. The petition should be denied.

II.

THE COURT SHOULD NOT GRANT THE PETITION FOR CERTIORARI ON THE MERITS OF PETITIONERS' CHALLENGE TO THE CONSENT DECREE AND THE PLAN

In addition to seeking review of the Court of Appeals' holding that petitioners lack standing, petitioners invite this Court to review the merits of petitioners' constitutional and Title VII challenges to the Consent Decree and the Plan. Neither the district court nor the Court of Appeals reached the merits of petitioners' challenge. Accordingly, the Court should decline to reach these issues. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (general rule is that "federal appellate court does not consider an issue not passed upon below.").

This rule applies with particular force here. The substantive discrimination claims asserted by petitioners impose on them the burden of proving a number of contested factual matters, including, for example, the alleged causal connection between the Affirmative Action Plan or Consent Decree and any harm suffered by petitioners. The most striking characteristic of petitioners' showing below is a complete lack of evidentiary support for their theories. In other words, petitioners come before this Court with bare legal theories, unconnected to any substantial factual foundation and without proof of personal harm to individual parties. Despite this posture, petitioners seek not only reversal of a Court of Appeals holding that they lack standing, but entry of an affirmative ruling in their favor on the merits. Just as they ought not be permitted to use the lower courts as a vehicle for

the vindication of principles in the absence of facts, petitioners cannot turn to this Court as a forum for creating legal precedent divorced from a real case and controversy.

Moreover, a number of other procedural issues must be resolved before the merits may be addressed. The trial court never ruled upon a number of evidentiary objections posed by SFUSD because such a ruling was unnecessary in light of the court's standing ruling. For example, SFUSD objected to the statistical evidence presented by petitioners on the grounds that the data was over a decade old and, in part, related to the racial composition of the national workforce, which, under settled Title VII law, had no relevance to petitioners' summary judgment motion. Respondents also objected to a number of petitioners' factual assertions about their employment situations on the ground of lack of foundation. Moreover, respondents objected to all interrogatory responses that were not properly authenticated or verified.

In addition, respondents argued in their summary judgment motion that each of petitioners' claims was barred by the applicable statutes of limitations. For example, many of their claims related back to the early 1980's, years before this action was filed; three of the petitioners are now employed as permanent teachers with SFUSD. Although the lower courts' rulings made it unnecessary to reach this issue, the untimeliness of petitioners' claims is an insurmountable hurdle standing in the way of their goal. SFUSD also pointed out that only one of the petitioners obtained the requisite right-to-sue letter from the EEOC prior to instituting their Title VII action. For all of

these reasons, certiorari should not be granted with respect to petitioners' challenge on the merits to the Consent Decree and Affirmative Action Plan.

CONCLUSION

The petition for writ of certiorari should be denied.

DATED: November 11, 1993

Respectfully submitted,

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